

¹ 5 U.S.C. § 8101 *et seq.*

contended that appellant was never advised that he would no longer receive survivor's benefits if he remarried before the age of 60; rather OWCP advised him that he would receive survivor's benefits for the rest of his life. Counsel stated that appellant would suffer financial hardship in repaying the overpayment.

FACTUAL HISTORY

On February 22, 1985 OWCP accepted appellant's claim for survivor's benefits, finding that the death of the employee, his wife, on September 19, 1984 was work related.² It paid him survivor's benefits beginning September 20, 1984. On July 5, 1986 appellant then 51 years old, remarried.

By letter dated March 1, 2010, OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$357,733.95 for the period July 5, 1986 to February 13, 2010, because he remarried on July 5, 1986. An overpayment worksheet and computer printouts established that he was paid survivor's benefits of \$32.80 on July 5, 1986 and \$407,821.79 from July 6, 1986 through February 13, 2010, totaling \$407,854.50, less \$22,044.00, the lump-sum payment he should have received on July 5, 1986 and credits for retained health benefits of \$23.16 on July 5, 1986 and \$28,053.48 from July 6, 1986 through February 13, 2010, resulting in a \$357,733.95 overpayment. Appellant was found without fault in creating the overpayment. OWCP requested that he complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. It notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

By letter dated March 30, 2010, received by OWCP on April 2, 2010, appellant requested waiver of recovery of the overpayment on the grounds that it would defeat the purpose of FECA and be against equity and good conscience under 20 C.F.R. § 10.437. He also requested a telephone conference regarding the overpayment.

In an April 2, 2010 decision, OWCP finalized the preliminary overpayment decision, finding that appellant received an overpayment in compensation in the amount of \$357,733.95. While appellant was not at fault, he was not entitled to waiver of the overpayment. He was instructed to repay the overpayment in the amount of \$1,000.00 per month.

On April 28, 2010 appellant, through his attorney, requested an oral hearing.

By letter dated May 21, 2010, OWCP advised counsel that the April 2, 2010 decision was not subject to the hearing provision of 5 U.S.C. § 8124(b). It advised him of the right to appeal to the Board if he disagreed with that decision.

In a June 18, 2010 letter, appellant stated that he had agreed to a lesser amount of compensation in order to continue receiving it for the remainder of his life. His receipt of

² On September 19, 1984 the employee, then a 46-year-old rural carrier, sustained a broken neck as a result of a motor vehicle accident while delivering mail on her route. She was transported to a hospital where she died of her injury.

compensation for 24 years after he remarried reinforced his belief that he was entitled to receive such compensation. Appellant stated that he first advised OWCP about his remarriage in 1988. He again requested an oral hearing. Appellant also requested waiver of the overpayment on the grounds that he relied on misleading and incorrect information from OWCP and was financially unable to repay the funds.

By letter dated July 8, 2010, appellant, through his attorney, requested reconsideration of the April 2, 2010 decision. He completed the OWCP-20 form on July 7, 2010 and indicated that he no longer had the incorrectly paid checks or payments. Appellant listed a 31-year-old son as a dependent. He reported monthly income of \$1,733.30 in social security benefits, \$6,984.16 in take-home earnings and \$300.00 in recreational vehicle space rental, totaling \$9,017.46. Appellant had \$200.00 cash on hand, \$715.00 in a checking account, \$6,000.00 in a savings account and \$12,000.00 value of other personal property and funds, totaling \$18,915.00. He listed monthly expenses which included \$1,332.34 for rent or mortgage, \$500.00 for food, \$300.00 for clothing, \$1,264.00 for utilities, \$2,000.00 for other expenses, \$1,500.00 for credit cards, \$1,560.83 for life, health and long-term care insurance and \$1,288.93 for a mortgage on a 1995 Winnebago motor home worth \$90,000.00, totaling \$9,746.10.

In an affidavit dated July 8, 2010, appellant stated that he reported his remarriage to OWCP each year since it took place and assumed that he was entitled to continue receiving survivor's benefits. This was consistent with advice given to him by OWCP representatives who stated at the time he was granted the benefits, that he would continue to receive them for the rest of his life. Beginning in 1997, appellant supported his son who was trying to start a music career. He gave him an average of \$2,000.00 a month based on his reliance on his monthly survivor's benefits. Appellant contended that he was unable to repay the overpayment due to his deteriorating health, which prevented him from obtaining employment. In addition, he could not sell his house or motor home because they were worth less than the purchase prices and remodeling costs.

In a July 23, 2010 decision, OWCP set aside the April 2, 2010 decision to schedule a telephone conference as requested by appellant regarding the overpayment. Following an August 12, 2010 telephone conference, appellant submitted financial records.

By letter dated November 24, 2010, OWCP requested that appellant submit verification of spousal income, savings account statements and explanations regarding "DDA" deposits from his bank account, why his son was listed as a dependent and the \$12,000.00 value for his personal property.

In a November 30, 2010 letter, appellant's attorney stated that for several years appellant financially supported his son who was unable to support himself as a musical performer. The \$12,000.00 personal property value was for jewelry and foreign currency. Counsel noted that appellant had undergone surgery to remove cancerous tumors from his kidneys and thyroid and that he probably would not be able to return to either part-time or full-time work. As a result, appellant's income would be less than previously reported. He contended that appellant should not be required to repay the overpayment as he was not at fault in creating it. Additional financial records were submitted, which included bank statements which indicated that "DDA" payments represented his hospital checks.

In a March 16, 2011 decision, OWCP found that appellant was without fault in the creation of the overpayment he received in the amount of \$357,733.95 for the period July 5, 1986 through February 13, 2010. It denied waiver of the recovery of the overpayment, finding that he failed to submit sufficient evidence to establish that repayment of the overpayment would defeat the purpose of FECA or be against equity and good conscience. Appellant was ordered to repay the overpayment in the amount of \$1,000.00 a month.

LEGAL PRECEDENT -- ISSUE 1

OWCP procedures state that:

“Widows and Widowers. If the spouse has remarried, the claims examiner will need to determine her or his age at the time of remarriage. A widow or widower over age 60 (prior to May 29, 1990) or over age 55 (May 29, 1990 or later) is entitled to continue receiving monthly benefits. If the surviving spouse is younger, the claims examiner must initiate action to terminate benefits and pay the 24-month lump sum.”³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$357,733.95 for the period July 5, 1986 through February 13, 2010. The record establishes that OWCP paid him survivor's benefits following the September 19, 1984 employment-related death of the employee, his wife. Appellant remarried on July 5, 1986 at the age of 51 years old, but received survivor's benefits through February 13, 2010. OWCP's procedures provide that a surviving spouse younger than 55 years old, who remarries, is not entitled to continuing monthly benefits. Instead, the surviving spouse is paid a 24-month lump sum.⁴ Computer print-outs and overpayment worksheets of record support that appellant received compensation in the amount of \$32.80 on July 5, 1986 and \$407,821.79 from July 6, 1986 through February 13, 2010, totaling \$407,854.50. The \$22,044.00 lump-sum payment he should have received during the stated period due to his remarriage on July 5, 1986 and credits for retained health benefits of \$23.16 on July 5, 1986 and \$28,053.48 from July 6, 1986 through February 13, 2010 were subtracted from the \$407,854.50 payment to determine the \$357,733.95 amount of the overpayment. The Board finds, therefore, that appellant received an overpayment in compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Death Claims*, Chapter 2.700.17(c) (August 1994).

⁴ *Id.*

⁵ 20 C.F.R. § 10.433(a).

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁶

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. The first \$4,800.00 or more, depending on the number of claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.⁷ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁸

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.⁹ Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹⁰

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment of compensation, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹¹

Appellant furnished OWCP with an overpayment questionnaire on July 7, 2010 and submitted supporting financial information following the telephone conference held on August 12, 2010. He reported monthly income of \$9,017.46 and monthly expenses of \$9,746.10.

⁶ *Id.* at § 10.434. See 5 U.S.C. § 8129(b).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

⁸ *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

⁹ 20 C.F.R. § 10.437(a).

¹⁰ *Id.* at § 10.437(b).

¹¹ *Id.* at §§ 10.436, 10.437.

Regarding appellant's \$2,000.00 a month payments to his 31-year-old son to help him pursue a music career, the Board finds that this is excluded from his monthly expenses because his son does not qualify as a dependent under FECA. A child is considered a dependent if he or she is under 18 years of age or over 18 but unmarried and incapable of self-support because of a physical or mental disability.¹² It also includes an unmarried full-time student under 23 years of age who has not completed four years of education beyond high school.¹³ Appellant's 31-year-old son is over the age of 23 but there is no evidence that he is unmarried and incapable of self-support because of a physical or mental disability. As his son does not qualify for dependent status, this \$2,000.00 monthly payment in support of his son's music career is not considered an ordinary and necessary living expense. The Board finds, therefore, that the \$2,000.00 payment is excluded from appellant's monthly expenses, resulting in monthly expenses of \$7,746.10. As the record establishes that his monthly income exceeds his monthly expenses by \$1,271.36, he is not entitled to waiver as he does not need substantially all of his income to meet current ordinary and necessary expenses.

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, appellant relinquished a valuable right or changed his position for the worse. Appellant argued that he would not have given his son \$2,000.00 a month if he had known that he was not entitled to continue to receive survivor's benefits for the rest of his life following his remarriage on July 5, 1986. As found above, his son is not a dependent as defined under FECA and its implementing regulations. The Board finds, therefore, that appellant's argument is not relevant.

Appellant further argued that he first advised OWCP about his remarriage in 1986 when it first took place and every year thereafter and that it misinformed him that he would continue to receive compensation for his lifetime. His contentions largely go to the issue of fault, which was not found by OWCP. The Board has held that, although OWCP may have been at fault in making an overpayment, this fact alone does not relieve the overpaid individual or any other individual from whom OWCP seeks to recover the overpayment from liability for repayment.¹⁴ Further, even if appellant detrimentally relied on erroneous information, such reliance does not give rise to equitable estoppel against OWCP or entitle him to a monetary benefit otherwise not permitted under FECA or implementing federal regulations.¹⁵ The Board finds that he has not established that recovery of the overpayment would be against equity and good conscience since there is no evidence of record from which to conclude that he relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse.

¹² 5 U.S.C. §§ 8110(a)(1) and 8101(17); *id.* at § 10.405; *see also* *Leon J. Mormann*, 51 ECAB 680 (2000).

¹³ *Id.* at § 10.405(a).

¹⁴ *Earl D. Long*, 50 ECAB 464, 472 (1999).

¹⁵ *See Robert P. Mitchell*, 52 ECAB 116 (2000); *Norman W. Hanson*, 45 ECAB 430 (1994).

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that he has failed to show that OWCP abused its discretion by refusing to waive the \$357,733.95 overpayment.¹⁶

On appeal, counsel contended that appellant is entitled to waiver as recovery of the overpayment would defeat the purpose of FECA and be against equity and good conscience. He stated that appellant was never advised that he would no longer receive survivor's benefits if he remarried before the age of 60. Counsel further stated that OWCP advised him that he would receive survivor's benefits for the rest of his life. Lastly, he stated that appellant would suffer financial hardship in repaying the overpayment. As noted, appellant did not demonstrate detrimental reliance or that recovery would cause financial hardship. OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience. The Board finds, therefore, that it properly found that waiver of the recovery of the overpayment was not warranted.

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment in the amount of \$357,733.95 from July 5, 1986 through February 13, 2010. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁶ As recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the amount OWCP determined that appellant should repay each month. *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board